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KOH TIONG HOCK

v.

PP

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COURT OF APPEAL, PUTRAJAYA
TENGKU BAHARUDIN SHAH JCA
WAN ADNAN MOHAMAD JCA
SULONG MATJERAIE JCA
[CRIMINAL APPEAL NO: P-05-1-02]

C

7 JULY 2010

CRIMINAL LAW: *Dangerous Drugs Act 1952 - Section 39B - Trafficking - Drugs taped to body of appellant to avoid detection - Whether an inescapable inference that appellant had knowledge of*

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dangerous drugs - Admission of transporting drugs out of country - Whether there was overwhelming evidence of knowledge, possession and trafficking as defined under s. 2 Dangerous Drugs Act 1952

CRIMINAL LAW: *Dangerous Drugs Act 1952 - Section 39B - Trafficking - Allegation of - Definition of trafficking - Dangerous Drugs*

E

Act 1952, s. 2 - Inclusion of word 'exporting' - Whether puts distribution abroad within contemplation of law - Intention of Dangerous Drugs Act 1952 - Whether to encompass drugs brought into and out of the country

EVIDENCE: *Statement - Cautioned statement - Admissibility -*

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Voluntariness - Whether circumstances showed that statement voluntarily given - Whether admission as evidence allowed

The appellant was tried and convicted by the High Court for an offence of trafficking in dangerous drugs committed on 21 July

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2000 at 4pm at the departure gate of the Bayan Lepas International Airport in Penang. He was duly sentenced as mandated under s. 39B of the Dangerous Drugs Act 1952 (DDA). Dissatisfied, the appellant appealed. The facts of the case were that the appellant was arrested by SP4 and SP5 while waiting to

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exit at the said departure gate and taken to the Airport Police Station where a body search was carried out on him. Eight transparent plastic packets (P12A-H) containing tablets were found taped to his abdomen, three each on the front and back and one on each side with three body braces strapped over them wrapping

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them around his body. P12A-H contained a total of 7468 tablets which were subsequently analysed by the government chemist SP3

and found to contain 801.7 gram of 3, 4 methylene dioxymethamphetamine or MDMA (the proscribed drug), a dangerous drug defined under the DDA. A statement under s. 37A of the DDA was recorded by SP7 and was admitted as evidence after a trial within a trial and marked as exh. P35. Therein the appellant admitted that he came to Penang on 20 January 2000 at a friend's request by telephone to collect something from there to be taken to Singapore and New Zealand. He also admitted to having previously carried drugs from Bangkok to Taiwan and from Amsterdam to Bangkok for which he was paid SD7000 for each trip. In calling for the appellant's defence, the trial judge found that the appellant had custody and control as well as knowledge of the proscribed drug in the packets strapped around his body and there was thus a *prima facie* case of trafficking. In the appellant's defence, he submitted that he was forced by the two male Chinese to carry and deliver to someone in New Zealand the packets which were strapped around his body and that he had no knowledge and was not informed of their contents. On P35, the appellant contended that he gave the statement for fear of being beaten up and in the hope of a lesser charge being proferred against him. The trial judge, after having duly considered the appellant's defence, rejected the same. He found no reasonable doubt raised on the case against the appellant and convicted him. The appellant herein submitted that (i) the admissibility of P35 and the court's reliance on it should be challenged; (ii) the trial judge was wrong in finding that the appellant knew about the proscribed drug merely on the ground that P12 A-H containing the said drug were tied around his body; (iii) this was not a case of drug trafficking but one of drug in transit as the appellant was on transit to Singapore and the drug was intended to be taken to New Zealand and not for distribution in this country.

Held (dismissing the appeal; affirming the conviction and sentence)

Per Tengku Baharudin Shah JCA delivering the judgment of the court:

(1) The objection to the admissibility of P35 was not for any inaccuracy of its contents or translation but rather for not being voluntarily given. Despite so objecting the appellant chose not to take the stand in the trial within a trial to rebut

A the prosecution evidence that he voluntarily gave the statement and that he was made aware and knew that he was not obliged to give a statement and yet chose to give one on his own free will. The caution was also duly administered. The appellant did not deny that the statement was his or that it
B was not what he said, nor that it was voluntarily given. Looking at the circumstances leading to the recording of P35 and the reaffirmation of its contents by the appellant by signing on its every page and the appellant's testimony in defence, there was no cause to disturb the findings of the trial judge
C at the end of the trial within the trial. He had duly evaluated the evidence and all the allegations raised before arriving at the correct conclusion that P35 was voluntarily given by the appellant and thereby allowing its admission as evidence. The learned judge was also right in finding the appellant's assertion
D that he had given the statement in fear of being beaten and that the police had asked him to admit that the drug belonged to him in return for the reduction of the charge against him to be mere afterthought. (paras 8-10)

E **(2)** The manner the packets P12A-H containing the proscribed drug were taped to the appellant's body, covered with braces and concealed under his T-shirt and jacket to avoid detection supported an inescapable inference that he must have known that they contained dangerous drugs. Such inference was
F further fortified by the appellant's own admission in P35 that he was paid to transport the said drug out of the country. On top of that, the eight plastic packets were transparent and the drug tablets contained therein could be seen. It was unlikely the appellant did not see them when the packets were taped
G to the front and sides of his abdomen. There was clearly overwhelming evidence for the learned judge to find not only knowledge and possession but also trafficking as defined under s. 2 of the DDA of the proscribed drug by the appellant to require his explanation and to reject what was proferred in
H defence. (paras 14 & 15)

(3) The inclusion of the word 'exporting' as an act of trafficking in the definition of 'trafficking' in s. 2 clearly puts distribution abroad within the contemplation of the law. The gravamen of
I the charge was not the act of distributing the drug but the act of transporting the proscribed drug for the purpose of distribution, irrespective of whether the purpose was achieved and irrespective of whether the intended distribution was

within the country or abroad. The intention of the DDA is to encompass both drugs brought into and out of the country. Hence, there was no merit in the appeal. The learned trial judge had given due consideration to the appellant's defence and correctly rejected them for cogent reasons thereby finding no reason to doubt the prosecution case against them. There was no reason to upset the conviction. (paras 19-20)

Bahasa Malaysia *Translation Of Headnotes*

Perayu telah dibicara dan disabit oleh Mahkamah Tinggi atas melakukan kesalahan mengedar dadah berbahaya pada 21 Julai 2000 pada pukul 4 petang di pintu keberangkatan Lapangan Terbang Antarabangsa Bayan Lepas di Penang. Perayu dijatuhkan hukuman seperti diberikan mandate di bawah s. 39B Akta Dadah Berbahaya 1952 (ADB). Tidak puas hati dengan keputusan tersebut, perayu membuat rayuan ini. Fakta kes adalah perayu ditangkap oleh SP4 dan SP5 semasa menunggu di pintu keluar pintu keberangkatan dan dibawa ke Stesyen Polis Lapangan Terbang di mana satu pemeriksaan badan dijalankan ke atas perayu. Lapan bungkusan plastik lutsinar (P12A-H) yang mengandungi pil-pil ditemui dilekatkan pada abdomennya, tiga setiap satu pada bahagian depan dan belakang dan satu pada bahagian tepi masing-masing dengan tiga pendakap badan diikat atas dan membaluti seluruh badan perayu. P12A-H mengandungi 7468 jumlah pil-pil yang dianalisa oleh ahli kimia kerajaan SP3 dan didapati mengandungi 801.7 gram dari 3, 4 methylene dioxymethamphetamine atau MDMA (dadah yang diharamkan), satu dadah berbahaya yang dinyatakan di bawah ADB. Satu kenyataan di bawah s. 37A ADB direkodkan oleh SP7 dan telah dimasukkan sebagai keterangan selepas satu perbicaraan dalam perbicaraan dan ditandakan sebagai exh. P35. Perayu mengakui bahawa beliau datang dari Penang pada 20 Januari 2000 atas permintaan seorang kawan melalui telefon untuk mengambil sesuatu untuk dibawa ke Singapore dan New Zealand. Perayu juga mengaku bahawa beliau telah membawa dadah berbahaya sebelum ini dari Bangkok ke Taiwan dan dari Amsterdam ke Bangkok di mana beliau dibayar SD7000 bagi setiap perjalanan. Dalam memanggil pembelaan perayu, hakim bicara telah mendapati bahawa perayu mempunyai kawalan dan jagaan dan juga pengetahuan dadah yang diharamkan di dalam bungkusan yang

A diikatkan sekitar badannya dan terdapat kes *prima facie* pengedaran. Dalam pembelaan perayu, beliau berhujah bahawa beliau telah dipaksa dua lelaki berbangsa Cina untuk membawa dan menyampaikan bungkusan-bungkusan yang diikatkan di sekitar badannya kepada seseorang di New Zealand dan beliau tidak B mempunyai pengetahuan dan tidak diberitahu mengenai kandungan-kandungannya. Mengenai P35, perayu berhujah bahawa beliau telah memberi pernyataan dalam keadaan takut kerana beliau risau akan dipukul dan juga beliau mengharapkan didakwa dengan kesalahan yang lebih ringan. Hakim bicara, selepas C mempertimbangkan pembelaan perayu, telah menolaknya. Hakim mendapati tiada keraguan munasabah dibangkitkan ke atas kes perayu dan menyabit perayu. Perayu di sini berhujah (i) kebolehmasukan P35 dan pergantungan mahkamah padanya sepatutnya dicabar; (ii) hakim bicara khilaf apabila mendapati D bahawa perayu berpengetahuan mengenai dadah yang diharamkan itu hanya atas alasan P12A-H yang mengandungi dadah tersebut diikat sekitar badan perayu; (iii) ini bukanlah kes pengedaran dadah tetapi membawa dadah berbahaya dalam perjalanan kerana perayu hanya dalam perjalanan ke Singapura dan dadah tersebut diniatkan E untuk dibawa ke New Zealand dan bukan untuk diedarkan di dalam negara ini.

Diputuskan (menolak rayuan; mengesahkan sabitan dan hukuman)

F **Oleh Tengku Baharudin Shah HMR menyampaikan penghakiman mahkamah:**

(1) Bantahan terhadap kebolehterimaan P35 bukan kerana kesilapan kandungannya atau terjemahan tetapi kerana ia tidak diberi secara sukarela. Walaupun perayu membantah perayu G memilih untuk tidak mengambil pendirian itu di perbicaraan dalam perbicaraan untuk menyangkal keterangan pendakwaan bahawa perayu telah memberi kenyataan dengan sukarela dan beliau diberitahu dan mengetahui bahawa beliau tidak wajib memberi kenyataan tetapi telah memilih untuk memberinya H dengan kerelaan hatinya sendiri. Amaran telah diberikan. Perayu tidak menafikan bahawa kenyataan adalah dari beliau atau ia bukanlah apa yang dinyatakan olehnya, atau sama ada

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ia telah diberi secara sukarela. Melihat kepada keadaan yang membawa kepada P35 direkodkan dan pengesahan kandungan oleh perayu dengan tandatangannya didapati pada setiap mukasurat dan testimoni perayu semasa pembelaan, tiada sebab untuk menganggu dapatan-dapatan hakim bicara pada akhir perbicaraan dalam perbicaraan. Hakim telah menilaikan keterangan dan segala dakwaan-dakwaan yang dibangkitkan sebelum membuat keputusan yang betul bahawa P35 telah dengan secara sukarela diberi oleh perayu dan membenarkan penerimaan sebagai keterangan. Yang arif hakim juga betul apabila memutuskan bahawa penegasan perayu yang beliau telah memberi kenyataan kerana takut dipukul dan polis telah menyuruhnya mengaku yang dadah itu kepunyaannya supaya beliau akan didakwa dengan kesalahan yang lebih ringan hanyalah perkara yang difikirkan kemudian.

(2) Cara bungkusan-bungkusan P12A-H yang mengandungi dadah yang diharamkan itu dilekatkan kepada badan perayu, diselubungi dengan pendakap badan dan disembunyikan di bawah t-shirt dan jaket untuk mengelak pengesanan menyokong inferens tidak dapat dielakkan bahawa perayu mesti mengetahui bahawa ia mengandungi dadah-dadah berbahaya. Inferens sedemikian seterusnya diperkuatkan oleh pengakuan perayu sendiri di dalam P35 yang beliau dibayar untuk mengangkut dadah tersebut ke luar negara. Selain itu, kelapan-lapan bungkusan plastik adalah telus dan pil-pil dadah yang terkandung di dalam boleh dilihat. Tidak berkemungkinan yang perayu tidak melihat pil-pil tersebut apabila bungkusan-bungkusan dilekatkan pada bahagian depan dan tepi abdomen. Terdapat keterangan jelas untuk hakim bicara mendapati bukan sahaja kewujudan pengetahuan dan milikan tetapi juga pengedaran seperti dinyatakan di bawah s. 2 ADB mengenai dadah yang diharamkan oleh perayu untuk memerlukan penjelasan dan untuk menolak apa yang diberi dalam pembelaan.

(3) Kemasukan perkataan 'exporting' sebagai tindakan mengedar di dalam takrif 'trafficking' di s. 2 dengan jelasnya meletakkan distribusi di luar negara dalam iktibar undang-undang. Gravamen pertuduhan bukannya tindakan mengagihkan dadah tetapi tindakan mengangkut dadah yang diharamkan bagi tujuan distribusi, tanpa mengira sama ada tujuan dicapai dan

A tanpa mengira sama ada niat distribusi adalah di dalam negara atau di luar negara. Tujuan ADB adalah untuk merangkumkan kedua-dua dadah yang dibawa ke dalam negara dan ke luar negara. Oleh itu, tiada merit bagi rayuan ini. Yang arif hakim telah memberi pertimbangan kepada pembelaan perayu dan
B telah dengan betul menolaknya atas alasan-alasan yang kukuh oleh itu mendapati tiada sebab untuk meragui kes pendakwaan terhadap mereka. Tiada sebab untuk mengacau sabitan.

Case(s) referred to:
C *Chan Ming Cheng v. PP [2002] 4 CLJ 77 CA* ***(refd)***
Cheong Su Leong v. PP [1948 - 49] MLJ Supp 56 ***(refd)***
Emmanuel Yaw Teiku v. PP [2006] 3 CLJ 597 FC ***(refd)***
Gunalan Ramachandran & Ors v. PP [2004] 4 CLJ 551 CA ***(refd)***
Lau Chi Sing v. PP [1988] 1 LNS 187 ***(refd)***
Msimanga Lesaly v. PP [2005] 1 CLJ 398 CA ***(refd)***
D *Ong Ah Chuan v. PP & Another Appeal [1980] 1 LNS 181 PC* ***(refd)***
Parlan Dadeh v. PP [2009] 1 CLJ 717 FC ***(refd)***
PP v. Abdul Rahman Akif [2007] 4 CLJ 337 FC ***(refd)***
Chan Pean Leon v. PP [1956] 1 LNS 17 HC ***(refd)***
PP v. Jorge Enrique Pellon Tellon [1998] 4 CLJ 278 CA ***(dist)***
E *PP v. Law Say Seck & Ors [1970] 1 LNS 114 HC* ***(refd)***
PP v. Lim Ah Hai [1992] 3 CLJ 1733; [1992] 3 CLJ (Rep) 372 HC ***(refd)***
PP v. Mohd Fuzi Wan Teh & Anor [1989] 2 CLJ 652; [1989] 2 CLJ (Rep) 341 HC ***(refd)***
PP v. Mohd Radzi Abu Bakar [2006] 1 CLJ 457 FC ***(refd)***
Teh Hock Leong v. PP [2008] 4 CLJ 764 CA ***(refd)***
F *Toh Su Kuan v. PP [2005] 3 CLJ 740 CA* ***(refd)***
Tunde Apatira & Ors v. PP [2001] 1 CLJ 381 FC ***(refd)***
Warner v. Metropolitan Police Commissioner [1968] 2 All ER 356 ***(refd)***
Wjchai Onprom v. PP [2006] 3 CLJ 724 CA ***(refd)***
Wong Nam Loi v. PP [1998] 1 CLJ 37 CA ***(refd)***

G **Legislation referred to:**
Dangerous Drugs Act 1952, ss. 2, 21(6), 37A, 39B

For the appellant - Gurbachan Singh; M/s Bachan & Kartar
For the prosecution - Wong Chiang Kiat DPP

H *Reported by Suhainah Wahiduddin*

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JUDGMENT

Tengku Baharudin Shah JCA:

[1] The appellant was tried and convicted by the Penang High Court for an offence of trafficking in dangerous drug committed on 21 July 2000 at about 4pm at the departure gate of the Bayan Lepas International Airport in Penang. He was duly sentenced as mandated under s. 39B of the Dangerous Drugs Act 1952 (DDA). We heard his appeal and dismissed it, we affirmed the conviction and sentence.

[2] The facts of the case are basically undisputed. On the date and at the time as stated in the charge the appellant was waiting to exit at the departure gate No. 6 when he was arrested by SP4 and SP5 and taken to the Airport Police Station where a body search was carried out on him. Eight transparent plastic packets (P12A-H) containing tablets were found taped to his abdomen, three each in the front and back and one on each side with three body braces strapped over them wrapping them around his body. He wore his T-shirt over them and also a blue jacket outside. He also had a trolley bag and a sling bag with him. From the sling bag were recovered two plane tickets for the journey from Penang to Singapore dated 21 July 2000 and from Singapore to Penang dated 20 July 2000, a boarding pass dated 21 July 2000 a Singapore identity card and a Singapore passport all bearing his name.

[3] P12A-H contained a total of 7468 tablets which were subsequently analysed by the Government chemist SP3 and found to contain 801.7 gram of 3, 4 methylene dioxymethamphetamine or MDMA (the proscribed drug) a dangerous drug defined under the DDA.

[4] A statement under s. 37A of the DDA was recorded by SP7 around midday on the day after the appellant's arrest. It was admitted as evidence after a trial within a trial and marked as exh. P35. Therein the appellant admitted that he came to Penang on 20 January 2000 at a friend's request by telephone to collect something from there to be taken to Singapore and New Zealand. Two male Chinese strapped P12 A-H around his body at a hotel and he was told what to do and given a plane ticket. He also

admitted having previously carried drugs from Bangkok to Taiwan and from Amsterdam to Bangkok for which he was paid SD7000 for each trip. From this third trip he was to be paid 80 sen per tablet.

[5] In calling for the appellant's defence the learned trial judge found the appellant had custody and control as well as knowledge of the proscribed drug in the packets strapped around his body. The manner in which they were concealed irresistibly inferred that he had the pre-requisite knowledge. Besides that the appellant also admitted in P35 that he was paid to transport P12 A-H out of Penang. There was thus a *prima facie* case of trafficking.

[6] In his defence the appellant said that he was forced by two male Chinese he met in Penang to carry and deliver to someone in New Zealand the packets P12 A-H which were strapped around his body and that he had no knowledge and was not informed of their contents. He was given the plane ticket, NZD1000 in cash and some Malaysian and Singapore currencies. On P35, the appellant contended that he gave the statement for fear of being beaten up and that what he related therein about the telephone call in Singapore and the offer to fetch and carry something to New Zealand was untrue. He said he gave the statement in the hope of a lesser charge being proferred against him. The learned trial judge after having duly considered the appellant's defence rejected the same. He found no reasonable doubt raised on the case against the appellant and convicted him.

[7] Before us, learned counsel for the appellant again challenged the admissibility of P35 and the court's reliance on it. He contended that the learned trial judge was wrong to admit P35 because the recording officer also acted as interpreter and he was an interested person. Reliance was placed on *Cheong Su Leong v. PP* [1948 - 49] MLJ Supp 56 and *Chan Ming Cheng v. PP* [2002] 4 CLJ 77. He also submitted that the caution was not sufficiently explained to the appellant and there was no evidence of the exact words used in cautioning him. Counsel cited cases of *PP v. Mohd Fuzi Wan Teh & Anor* [1989] 2 CLJ 652; [1989] 2 CLJ (Rep) 341, *PP v. Lim Ah Hai* [1992] 3 CLJ 1733; [1992] 3 CLJ (Rep) 372 and *PP v. Law Say Seck & Ors* [1970] 1 LNS 114. It was also submitted that for capital punishment cases the caution

should reflect the consequence of a death sentence arising from the statement. Then counsel conceded that the caution under the DDA was duly complied with and that the appellant did not testify in the trial within a trial but it was submitted that the appellant in this defence did say that the police asked him to admit the drug belonged to him and that if he did the charge against him would be reduced.

[8] It is significant that SP7 spoke to the appellant in the Hokkien dialect, that being the language of the latter's choice as reflected in the first part of P35. Though P35 was recorded in Bahasa Malaysia the objection to its admissibility was not for any inaccuracy of its contents or translation but rather for not being voluntarily given. Despite so objecting the appellant chose not to take the stand in the trial within a trial to rebut the prosecution evidence that he voluntarily gave the statement and that he was made aware and knew that he was not obliged to give a statement and yet chose to give one on his own free will. Indeed learned counsel conceded that the caution was duly administered. In fact the appellant in his own defence did not, after the contents of P35 was translated to him by the court Chinese interpreter, deny that the statement was his or that it was not what he said, nor that it was not voluntarily given. On the contrary, he only alleged for the first time, that he gave the statement out of fear of being beaten up. Even then he did not say what caused him to harbour such fear nor whether anyone had used any force or threat against him to give rise to such fear. The appellant's own words on the matter removed any doubt that he volunteered the information given to SP7 in P35. This is what he said:

> Saya bekerjasama dengan Insp. Chang (SP7) untuk memberi kenyataan. Tujuan saya bekerjasama ialah supaya dapat ringankan tuduhan. (See page 133 AR)

That tantamounts to an admission that he willingly gave the statement to SP7 whatever his intention. He in fact denied that SP7 promised him a lesser charge and if anyone else did the appellant would have so stated.

[9] The circumstances leading to the recording of P35 and the reaffirmation of its contents by the appellant by signing on its every page and the appellant's testimony in defence did not permit reliance on the authorities cited by learned counsel which are

totally distinguishable and irrelevant. We found no cause to disturb the findings of the learned trial judge at the end of the trial within the trial. He had duly evaluated the evidence and all the allegations raised before arriving at the correct conclusion that P35 was voluntarily given by the appellant and thereby allowing its admission as evidence.

[10] As for counsel's submission that the trial judge should have reconsidered his decision to admit P35 in view of the appellant's allegation in his defence that he gave the statement in fear of being beaten and that the police had asked him to admit that the drug belonged to him in return for the reduction of the charge against him, we have no doubt that the learned judge was right in finding such assertion to be mere after thought. Were the allegation true the appellant would have raised them in the course of the trial within the trial. He did not testify nor cross-examine any prosecution witness on point. SP4 was not challenged when he said the caution under s. 37A of the DDA was read to the appellant as early as the time of his arrest. It is also not denied that SP7 again explained to him the caution before recording P35 less than 24 hours later. Even in his defence the appellant did not at anytime aver that he gave the statement because of any inducement, threat or promise. On the contrary, he proferred that he cooperated with the police (by giving the statement) in the hope of getting a lesser charge, impliedly admitting that P35 was voluntarily given.

[11] Learned counsel then disputed the learned trial judge's finding of knowledge. He contended that the judge was wrong in finding that the appellant knew about the proscribed drug merely on the ground that P14A-H which contained the said drug was tied around his body. He urged us to follow the decision of this court in *Toh Su Kuan v. PP* [2005] 3 CLJ 740 which held that the manner in which the packets were fastened to the appellant's person (strapped to his legs, tied to his waist and concealed in his shoes) only show at the highest that he had knowledge the packets contained some prohibited substance which was unlawful to have in one's possession, but not prove that the appellant knew the packets contained heroin the drug which formed the subject matter of the charge. In other words *mens rea* possession had not been established. That decision was said to be still good law as it had not been overruled by the Federal Court.

[12] With respect, the law is clear and well settled in that knowledge or intention as the mental element of an offence can only be proved by inference from the surrounding circumstances. See *Chan Pean Leon v. PP* [1956] 1 LNS 17, *Warner v. Metropolitan Police Commissioner* [1968] 2 All ER 356 HL; *Ong Ah Chuan v. PP & Another Appeal* [1980] 1 LNS 181 PC; *Wong Nam Loi v. PP* [1998] 1 CLJ 37 CA and *PP v. Abdul Rahman Akif* [2007] 4 CLJ 337 FC and *Emmanuel Yaw Teiku v. PP* [2006] 3 CLJ 597 FC. The effect of the decision *Toh Su Kuan* (*supra*) is clearly to the contrary in holding that knowledge can be proved only by direct evidence and not by way of drawing an inference from proved facts. We note that *Toh Su Kuan* (*supra*) has been disregarded, not followed or practically ignored by subsequent decisions of this court. See *Gunalan Ramachandran & Ors v. PP* [2004] 4 CLJ 551, *Msimanga Lesaly v. PP* [2005] 1 CLJ 398 and *Wjchai Onprom v. PP* [2006] 3 CLJ 724. It may not have been specifically overruled but the Federal Court had struck its death knell when it was rejected for being erroneous and inconsistent with settled legal principles. See *Parlan Dadeh v. PP* [2009] 1 CLJ 717 which held that *Toh Su Kuan (supra)* should be overruled and not followed for being erroneous and *per incuriam*.

[13] In *Tunde Apatira & Ors v. PP* [2001] 1 CLJ 381 where packets of drug were swallowed by the appellants and found in their stomachs when arrested, the Federal Court affirmed their convictions for trafficking holding that the totality of the evidence reasonably supports that the appellants were in actual possession of the proscribed drug at the time of their initial detention. In *Teh Hock Leong v. PP* (Criminal Appeal No. 05-84-2003 since reported in [2008] 4 CLJ 764) the proscribed drug in the form of solution was soaked in towel and under clothes and transported in a back pack with clear object to avoid detection. This court held that the evidence of knowledge can be inferred as follows:

> The method employed to convey or transport a drug may sometimes furnish evidence of knowledge. For example, an attempt to carefully conceal a drug may indicate an intention to avoid detection and thereby put to knowledge. Of course it all depends on the fact of each case.

[14] In our case the manner the packets P12 A-H containing the proscribed drug were taped to the appellant's body, covered with braces and concealed under his T-shirt and jacket to avoid detection supports an inescapable inference that he must have known that they contained dangerous drug. Such inference is further fortified by the appellant's own admission in P35 that he was paid to transport the said drug out of the country. On top of that you need only look at any of the 8 transparent plastic packets P12 A-H to see the drug tablets contained therein. Photographs P7A and B show how visible they were to the naked eye, it was most unlikely for the appellant not to have seen them when the packets were taped to the front and sides of his abdomen.

[15] On established facts, there is clearly overwhelming evidence for the learned judge to find not only knowledge and possession but also trafficking as defined under s. 2 of the DDA of the proscribed drug by the appellant to require his explanation and to reject what was proferred in defence.

[16] In *Wjchai Onprom v. PP* [2006] 3 CLJ 724 the facts are similar to the present case but minus the caution statement. The appellant therein was entering the country from Thailand, instead of leaving as in this case, when he was arrested. Packets of drugs were found taped under his T-shirt and in his jacket pocket. Adopting the test of *mens rea* possession applied in *PP v. Mohd Radzi Abu Bakar* [2006] 1 CLJ 457 this court held that as the appellant was caught carrying a very large amount of drug from Thailand to Malaysia it was safe to infer that the drug was intended for trafficking and that it was not a case of mere passive possession but an overt act of concealing the drug on his person which reasonably supported the existence of criminal purpose proscribed by the DDA. The same facts also gave rise to a strong inference that the appellant was aware of the drug possessed and the power of disposal over it which provided *prima facie* proof of actual trafficking. The 7468 tablets or 801.7 gm of dangerous drugs in this case is undeniably a large quantity to be carried if not for distribution.

[17] The last ground canvassed before us pertains to drug in transit. It was submitted that this is not a case of drug trafficking but one of drug in transit as the appellant was on transit to

Singapore and the drug was intended to be taken to New Zealand and not for distribution in this country. The case of *PP v. Jorge Enrique Pellon Tellon* [1998] 4 CLJ 278 was relied on. In that case the charge of trafficking was reduced to one under s. 21(6) of the DDA and the respondent was convicted on his plea of guilty thereto. This court affirmed the conviction and sentence holding that the trial judge was right in finding that having physical possession of the drug in transit was an offence under s. 21(6). The cocaine there was found on the respondent's body as a result of detection by the walk-through detector at the transit gate of Terminal One of the SAAS Airport just before boarding the plane for Den Pasar, in Indonesia. The respondent was on his way from South America and never intended to enter this country, he was only brought out of the airport to the police station for proper search to be conducted.

[18] Section 2 of the DDA defines the term "in transit" as follows:

> 'in transit' means taken or sent from any country and brought in Malaysia by land, air or water (whether or not landed or transhipped in Malaysia) for the sole purpose of being carried to another country either by the same or another conveyance.

On the undisputed fact of the present case the proscribed drug was not in transit as it came from within the country. Nor was the appellant on transit as he transported the proscribed drug from a hotel in Penang to the Bayan Lepas Airport. The cited case is clearly distinguishable on its fact.

[19] Be that as it may, whether the proscribed drug was intended for distribution outside the country is totally irrelevant to the offence of trafficking under the DDA. The inclusion of the word 'exporting' as an act of trafficking in the definition of 'trafficking' in s. 2 clearly puts distribution abroad within the contemplation of the law. Secondly, the gravamen of the charge is not the act of distributing the drug but the act of transporting the proscribed drug for the purpose of distribution, irrespective of whether the purpose is achieved and irrespective of whether the intended distribution is within the country or abroad. As submitted by the learned deputy the intention of the DDA is to encompass both drugs brought into and out of the country. The reference to the

purpose for which the drug is being transported was made by the Privy Council in *Ong Ah Chuan v. PP & Another Appeal* [1980] 1 LNS 181 solely to draw a distinction between the offence of mere possession and that of trafficking as the law provides a far heavier punishment for the latter. As stated in the Singapore case of *Lau Chi Sing v. PP* [1988] 1 LNS 187, the offence is completed once there is the act of transportation so long as its purpose is to transfer possession for some other person in contradistinction to an intention to keep the drug solely for one's own consumption. Whether the transporter achieves his purpose is irrelevant to his guilt of the offence of trafficking.

[20] In the upshot and for the aforesaid reasons we found no merit in the appeal. We have also satisfied ourselves that the learned trial judge had given due consideration to the appellant's defence and correctly rejected them for cogent reasons thereby finding no reason to doubt the prosecution case against him. We saw no reason to upset the conviction. We decided accordingly.